

nondiscriminatory.<sup>67</sup> As discussed below, because the Telecom Rate has already been established and upheld as just and reasonable, it is well within the Commission's authority to apply this rate to any attachment used to provide a service other than, or in addition to, cable television service.

**D. The Commission has a duty under section 224 to identify the just and reasonable rate applicable to attachments used to provide VoIP.**

The Pole Attachments Act provides that the Commission "shall regulate the rates, terms and conditions for pole attachments."<sup>68</sup> The statute, in turn, defines "pole attachment" in relevant part as "any attachment by a cable television system" to a utility pole, duct, conduit or right-of-way.<sup>69</sup> An attachment by a cable system used to provide VoIP service is, therefore, a pole attachment subject to Commission regulation. However, because the Commission has not yet definitively classified VoIP as either an information service or a telecommunications service, and because the Cable Rate is not the default rate in the absence of such determination, the result is a significant gap in the Commission's regulation of pole attachments. The Commission is statutorily obligated to fill that gap by clarifying which pole attachment rate applies to VoIP attachments.

Establishing that the Commission has jurisdiction over all cable attachments is only the first step in discharging its statutory obligation. As the Supreme Court observed in *NCTA v. Gulf*, after determining that it had jurisdiction over commingled cable and internet services, the Commission "then had to set a just and reasonable rate."<sup>70</sup> Although the Commission has

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<sup>67</sup> 47 U.S.C. § 224(b)(1).

<sup>68</sup> 47 U.S.C. § 224(b).

<sup>69</sup> 47 U.S.C. § 224(a)(4), *see also* *NCTA v. Gulf Power* at 333 ("[a]s we have noted, the Act requires the FCC to regulate the rates, terms, and conditions for pole attachments," § 224(b), and defines these to include 'any attachment by a cable television system,' § 224(a)(4)").

<sup>70</sup> *NCTA v. Gulf Power* at 337.

asserted that the cable rate formula applies to commingled cable and certain internet services,<sup>71</sup> the Commission has yet to make a determination regarding the appropriate rate formula for commingled services that include interconnected VoIP. The Commission is therefore obliged to clarify the applicable pole attachment rate for VoIP.

**E. The Telecom Rate is just and reasonable for cable VoIP attachments.**

Cable companies defend the competitive advantage they enjoy by stating that the Cable Rate has been upheld as the “fully compensatory” and “just and reasonable” rate.<sup>72</sup> Their argument is wholly irrelevant and misleading. In these cases, the courts have simply deferred to the Commission to determine the just and reasonable rate for commingled cable services. The courts have repeatedly affirmed, not limited, the Commission’s discretion to apply a different rate if it chooses to do so.<sup>73</sup> Indeed, on every occasion the courts have specifically acknowledged that the Telecom Rate is just and reasonable.<sup>74</sup> Today, the congruence of VoIP and traditional telephony warrants that the Commission should choose regulatory parity, not the perpetuation of an entrenched subsidy for a specific subset of competitive service providers.

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<sup>71</sup> It should be noted that the Court in *NCTA v. Gulf Power* did not review the Commission’s choice of the cable rate for commingled cable and internet service. The Court addressed “only whether pole attachments that carry commingled services are subject to FCC regulation at all,” not “the rate the FCC has chosen, a question not now before us.” *Id.* at 338.

<sup>72</sup> *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Comments of the National Cable and Telecommunications Association at 35 (filed June 8, 2009).

<sup>73</sup> See, e.g., *NCTA v. Gulf Power* at 338; *Texas Util. Elec. Co. v FCC*, 997 F.2d 925 (D.C. Cir 1993).

<sup>74</sup> See *Alabama Power v. FCC*, 311 F.3d at 1371 n23, citing *In the Matter of Ala. Cable Telecomm. Ass’n*, 16 FCC Rcd. 12,209, ¶ 49 (“The FCC reached a perfectly logical conclusion when it observed: “‘Congress’ decision to choose a slightly different methodology, more suited in its opinion to telecommunications service providers, does not call into question the constitutionality of the cable rate formula . . . because both formulas provide just compensation under the Fifth Amendment . . . . Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates.”); *Georgia Power v. Teleport Comm. Atlanta*, 346 F.3d 1033 at 1047 (11<sup>th</sup> Cir. 2003) (holding that the Telecom Rate provides just compensation.

**F. Electricity consumers, many of whom do not subscribe to VoIP services, must not be forced to subsidize cable giants like Comcast and Time Warner Cable.**

Perpetuating a competitive advantage for cable VoIP relative to other competitive telephone providers unjustifiably distorts the market and inhibits competition. However, funding this competitive advantage at the expense of electric consumers—particularly those who neither have nor want VoIP service—is outrageous and anything but just and reasonable from the point of view of the consumer. The Cable Rate is inherently a subsidy rate formula because it does not divide the cost of the common (i.e., so-called “unusable”) space on the pole equally among all attachers.<sup>75</sup> As a result, electric utility customers are compelled to pay more than their fair share of the costs of pole infrastructure.

Congress mandated in section 224(c)(2)(B) of the Act that any State seeking to preempt the Commission’s regulation of the rates, terms, and conditions for pole attachments must certify that it has authority to consider and does consider “the interests of the consumers of the utility services.”<sup>76</sup> By establishing the consideration of utility consumer interests as a precondition for State preemption of Federal pole attachment regulation, Congress made clear that it likewise expects the Commission to take the interests of utility customers into consideration in regulating pole attachment rates.

Electric utility service is not a convenience, but rather a critical component of modern life. For the vast majority of Americans, electric service is a necessity, not an option. If cable VoIP providers are allowed to pay only the Cable Rate, a low-income or fixed-income customer

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<sup>75</sup> The Commission’s regulations define “unusable space” as “the space on a utility pole below the usable space, including the amount required to set the depth of the pole.” 47 C.F.R. § 1.1402(l). The cable attacher pays only a small portion of the entire cost of the pole, based only on the percentage of usable space it occupies. This approach disregards that the cable attacher, like any other user of the pole, needs the common space to maintain a sufficient ground clearance as is required by applicable safety codes such as the NESC. The Telecom Rate, although also a subsidy rate, at least allocates a portion of the common space among all attaching entities.

<sup>76</sup> 47 U.S.C. § 224(c)(2)(B).

who does not want VoIP service would effectively be forced to subsidize the cable company's provision of high-end "triple play" video, internet, and VoIP telephone services to users who need no subsidy. In any event, it is inequitable to expect electric ratepayers to subsidize participants in another industry. The Commission has a statutory obligation to prevent this unjust, unreasonable, and unconscionable result.

**G. Applying the Telecom Rate to VoIP is consistent with the section 706 mandate to promote broadband competition.**

Section 706 directs the Commission to encourage the deployment of advanced telecommunications capability in a manner consistent with "measures that promote competition in the local telecommunications market . . . ."<sup>77</sup> As the Commission explained in its recent VoIP Discontinuance Order: "We also are guided by section 706 of the 1996 Act, which, among other things, directs the Commission to encourage the deployment of advanced telecommunications capability to all Americans by using measures that 'promote competition in the local telecommunications market.'"<sup>78</sup> Applying the Telecom Rate to all telephone providers under the Commission's pole attachment jurisdiction, including cable VoIP providers, will promote competition by ensuring "regulatory parity among providers of similar services [and] will minimize marketplace distortions arising from regulatory advantage."<sup>79</sup>

### **III. CONCLUSION**

The Petitioners agree with Commissioner Copps that "[w]e all marvel at the tremendous and transformative potential of IP services .... But to unleash the full potential of this new technology and to ensure that these services succeed, we need rules of the road—clear,

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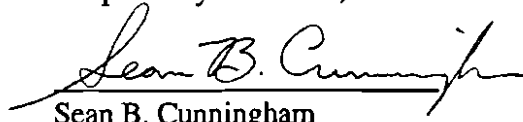
<sup>77</sup> 47 U.S.C. § 157 nt.

<sup>78</sup> Discontinuance Order at para. 13, quoting 47 U.S.C. § 157 nt.; *accord*, VoIP LNP Order at para. 29.

<sup>79</sup> VoIP LNP Order at para. 17.

predictable and confidence building.”<sup>80</sup> By clarifying the “rules of the road” regarding pole attachment rates for VoIP, the ruling requested in this Petition will bring greater competitive parity to broadband telephony markets, reduce disputes, and thereby help tap the full potential of broadband VoIP.

Respectfully submitted,



Sean B. Cunningham  
Hunton & Williams LLP  
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(202) 778-2225

*Counsel to Petitioners, American Electric  
Power Service Corporation, Duke Energy Corporation,  
Southern Company, and Xcel Energy Services Inc.*

Dated: August 17, 2009

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<sup>80</sup> *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, Statement of Michael K. Powel at 34 (2004), *aff'd*, *Minnesota PUC v. FCC*, 483 F.3d 570 (2007).

## Attachment I



National Cable & Telecommunications Association

TEXT SIZE: 2 AA

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About NCTA | Media Center | Organizations | Events | Resources | Industry Data | Innovation | Issues | Filings | eLibrary

## ABOUT NCTA

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## NCTA CHANGES ITS NAME TO NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION; Revamped Web Site Launched

Publication Type: Media Release  
Date: 4/30/2001

Marc O. Smith/Lori Stout-Chang, 202/775-3629

**WASHINGTON, DC** – NCTA's name-change – from the National Cable Television Association to the National Cable & Telecommunications Association – will become effective Tuesday, May 1, 2001. The change, first announced in February, reflects cable's transformation from a one-way video provider to a competitive supplier of advanced, two-way services, including digital video, high-speed Internet, cable telephony and interactive TV.

"Our new name better reflects the industry's changing landscape," said NCTA President & CEO Robert Sachs. "Cable is no longer simply a provider of one-way video programming. Cable is using its broadband infrastructure to provide consumers with a competitive choice of entertainment, information and telecommunications services."

Since passage of the 1996 Telecommunications Act -- intended to promote competition and investment in the telecommunications market -- the cable industry has raised and invested more than \$45 billion for facilities upgrades that make delivery of advanced, two-way services possible. The industry currently serves more than 10 million digital cable, four million cable modem and one million cable phone customers.

NCTA also will re-launch its web site ([www.ncta.com](http://www.ncta.com)) May 1. The revamped online resource will provide the latest industry information in a user-friendly format for the industry's customers, the media, NCTA members, and other interested parties.

The National Cable & Telecommunications Association (NCTA), formerly the National Cable Television Association, is the principal trade association of the cable television industry in the United States. NCTA represents cable operators serving more than 90 percent of the nation's cable television households and more than 150 cable program networks, as well as equipment suppliers and providers of other services to the cable industry. In addition to offering traditional video services, NCTA's members also provide broadband services such as high-speed Internet access and telecommunications services such as local exchange telephone service to customers across the United States.

Visit us at [www.ncta.com](http://www.ncta.com) for the latest information about the cable industry, including recent press releases, industry statistics, NCTA regulatory and court filings, cable's commitment to customer service, quality programming, education and technology initiatives, and much more.

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## Attachment II





## Davis Wright Tremaine LLP

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December 12, 2008

*Via First Class Mail and Email*

Joseph R. Lawhon  
Troutman Sanders, LLP  
600 Peachtree Street, NE  
Suite 5200  
Atlanta, GA 30308-2216

**Re: Georgia Power Pole Attachment Rental Rates and Survey**

Dear Joe:

I am writing on behalf of the Cable Television Association of Georgia ("CTAG") and its members, for clarification of the recent Georgia Power Company ("Georgia Power") pole attachment rate notices and attachment count survey sent to CTAG members, and to request further information concerning the same. For your reference, we have enclosed a sample rate notice and attachment count survey sent by J. Darryll Wilson on November 1, 2008 and by Lan Zhang on November 14, 2008, respectively.

First, on behalf of my clients we want to express our appreciation that Georgia Power requested telecommunications attachment usage data in advance of billing this year. I believe this effort to establish a just and reasonable bill prior to invoicing is a step forward from Georgia Power's past billing procedures. We do, however, have certain remaining concerns with both the increase notice and attachment count survey which we have outlined for you in this letter.

### Pole Count

The attached rate notices from Mr. Wilson provide for a cable rate of \$5.72. In order for CTAG to verify whether these rates have been calculated in accordance with Federal Communications Commission ("FCC") regulations, please provide the total number of poles solely owned by Georgia Power, the total number of poles jointly owned by Georgia Power and the percentages of joint ownership (*i.e.*, the pole equivalent number Georgia Power used to



calculate its rates).<sup>1</sup> In addition, please confirm that the pole count includes all Georgia Power poles used for distribution of any kind, regardless of their make or character, and that the count also includes all drop poles.

If we do not receive a current pole count from Georgia Power enabling us to verify the cable rate of \$5.72, we will advise CTAG members to continue to pay Georgia Power at the 2007-2008 rate of \$5.62. After the parties mutually agree upon the appropriate rate, we can arrange any necessary "true-up" payment. Of course, if Georgia Power's pole count data otherwise supports the \$5.72 rate, we will so advise our clients.

#### Telecom Rates

The attached rate notices from Mr. Wilson provide for telecommunications rates of \$14.83 and \$13.70 for rural and urban areas, respectively. While CTAG members do not dispute Georgia Power's right to implement a telecommunications rate in accordance with 47 U.S.C. § 224(e), Georgia Power has failed to provide sufficient information in support of its 2009 rates to demonstrate the average numbers of attaching entities justifies a departure from the FCC's presumptions. Accordingly, it is unclear to us that your telecommunications rates of \$14.83 and \$13.70 for rural and urban areas are lawful. As you are aware, the FCC's decisions in *Teleport* and in the *Consolidated Order* put the burden on Georgia Power to provide sufficient information to rebut the FCC's 3 and 5 entity presumptions.<sup>2</sup>

As you know, Georgia Power has attempted to rebut the telecom rate attaching entities presumptions in an ongoing dispute with Comcast before the FCC.<sup>3</sup> In that proceeding, Comcast explained in detail why Georgia Power's attempt to rebut the attaching entity presumptions was deficient under the FCC's rules and precedent in several ways.<sup>4</sup> That dispute remains pending before the FCC. More recently, in a related lawsuit involving Georgia Power and Comcast, a

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<sup>1</sup> 47 C.F.R. § 1.1404(j) ("A utility must supply a cable television operator or telecommunications carrier the information required in paragraph (g), (h) or (i) of this section... within 30 days of the request by the cable television operator or telecommunications carrier.").

<sup>2</sup> See *In re Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 70 (rel. May 25, 2001) ("Consolidated Order"), petitions for review denied, *Southern Company Services, Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002); *Teleport Communications Atlanta, Inc. v. Georgia Power Company*, Order on Review, 17 FCC Rcd 19859, ¶ 25 (rel. October 8, 2002) ("Teleport"), *aff'd*, *Georgia Power Co. v. Teleport Communications Atlanta, Inc.*, 346 F.3d 1033 (11<sup>th</sup> Cir. 2003).

<sup>3</sup> Most recently, you provided the FCC with an eight-page county-by-county list of attachments per pole that included the names of companies attached to the specific poles to which Comcast was attached. *Comcast Cable Communications Management, LLC v. Georgia Power Company*, File No. EB-07-MD-003, Response of Georgia Power, Exhibit A, Attachment 7, pp. 57-64 (Response filed October 26, 2007).

<sup>4</sup> *Comcast Cable Communications Management, LLC v. Georgia Power Company*, File No. EB-07-MD-003, Reply of Comcast, pp. 12-19 (Reply filed November 15, 2007).



Georgia state court held that disputes concerning attaching entity counts affecting the telecom rate should be resolved by the FCC.<sup>5</sup>

In light of the above, we have advised our clients, to the extent they provide telecommunications services, to pay a telecommunications rate of \$8.65 in urban areas and \$13.05 in rural areas, with the same true-up procedures described above for the cable rate should Georgia Power provide sufficient attaching entity survey data and the parties agree.

#### Notice of Telecom Use

Finally, Georgia Power's attachment count survey appears to ask cable operators to inform Georgia Power how many pole attachments are used to provide telecommunications on a county-by-county basis. We must inform you that the FCC's rules only require cable operators to notify pole owners when the cable operator begins to provide telecom service over pole attached facilities.<sup>6</sup> Furthermore, because it is not entirely clear to us what the attachment count survey is asking our clients to certify to, we have advised CTAG members not to complete it but instead to provide, in writing, the information sought by Georgia Power in order to render an accurate bill. Specifically, we are advising our clients to provide GPC with notice of telecommunications service and the specific numbers of *total* poles used to provide telecommunications. As CTAG members have done in the past, we have advised cable operators to inform Georgia Power of the counties in which any telecommunications service is located so Georgia Power may conduct an attaching entity survey for the relevant geographic area. We expect that Georgia Power's bills will accurately reflect this information once received from our clients.

#### VoIP is Not Telecommunications

Finally, we want to take this opportunity to remind you that CTAG members are not required to pay Georgia Power a telecom rate for VoIP pole attachments. Only pole attachments that are specifically used to provide telecommunications service are eligible for the higher telecom attachment rate. See 47 U.S.C. § 224(e)(1). Thus, regardless of the character of the attaching entity, it is the actual use of a pole attachment to carry telecommunications services or other services that determines the rate.

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<sup>5</sup> *Georgia Power Company v. Comcast Cable Communications of Pennsylvania, Inc., et al.*, Special Master's Proposed Finding of Facts and Conclusions of Law, File Nos. 2006-CV-116060, 2007-CV-135617, p. 13, ¶ 27 (Fulton Cty. Sup. September 19, 2008) ("[T]he FCC, not this Court, should resolve the specific calculations including the manner of attachment, rates, and formulas, because the Telecommunications Act reserves these issues to the FCC.").

<sup>6</sup> The FCC's Rules require cable operators to notify pole owners when the cable operator provides telecommunications service. See 47 C.F.R. § 1.1403(3).



Interconnected VoIP service has not been classified or defined by the FCC to be a telecommunications service as defined in Sections 153 and 224 of the Federal Communications Act, 47 U.S.C. §§ 153 and 224. Interconnected VoIP service falls under Section 9.3 of the FCC's Regulations, 47 C.F.R. § 9.3. The FCC has been considering the question of the classification of VoIP as either a telecommunications service or an information service in the *IP-Enabled Services* rulemaking proceeding.<sup>7</sup> Despite finding certain traditional social telecommunications regulations (such as E911, CALEA, CPNI, and TRS) applicable to VoIP, the Commission has repeatedly held that its rulings in other proceedings do not in any way prejudice the statutory classification of VoIP, and that it is in the *IP-Enabled Services* proceeding where such a classification will be made.<sup>8</sup> The Commission has found that VoIP services that start and end as VoIP and travel over the public Internet are not telecommunications services and that calls that start and end on the PSTN but are routed as VoIP in the middle are telecommunications services, but it has made no ruling as to Interconnected VoIP, which starts as VoIP and is terminated on the PSTN (or starts on the PSTN and is terminated as VoIP).<sup>9</sup> Furthermore, the FCC has suggested that Interconnected VoIP offered by cable may be preempted from state regulation in the same way that Vonage's VoIP service is preempted,<sup>10</sup> and

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<sup>7</sup> *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (rel. March 10, 2004).

<sup>8</sup> *E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10243, ¶ 26 (rel. June 3, 2005) ("We find that regardless of the regulatory classification, the Commission has ancillary jurisdiction to promote public safety by adopting E911 rules for interconnected VoIP services. This Order, however, in no way prejudices how the Commission might ultimately classify these services."); *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, ¶45 (rel. September 23, 2005) ("Indeed, the Commission has yet to determine the statutory classification of providers of interconnected VoIP for purposes of the Communications Act."); *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, *IP Enabled Services*, Report and Order and FNPRM, FCC 07-22, ¶ 54 (rel. April 2, 2007) ("Since we have not decided whether interconnected VoIP services are telecommunications services or information services as those terms are defined in the Act, nor do we do so today, we analyze the issues addressed in this Order under our Title I ancillary jurisdiction to encompass both types of service."); *See also Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, FCC 07-170, WC Docket 04-36, fn. 50 (rel. June 15, 2007) ("The actions we take today do not prejudice the Commission's ultimate classification of interconnected VoIP service as a 'telecommunications service' or as an 'information service' under the statutory definitions of those terms."); *See also Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, Declaratory Ruling, and NPRM, WC Docket 07-243, FCC 07-188, fn. 50 (rel. November 9, 2007) ("We continue to consider whether interconnected VoIP services are telecommunications services or information services as those terms are defined in the Act, and we do not make that determination today. *See* 47 U.S.C. § 153(20), (46) (defining 'information service' and 'telecommunications service').").

<sup>9</sup> *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, ¶ 2, n.3 (rel. February 19, 2004); *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (rel. April 21, 2004).

<sup>10</sup> *In the Matter of Vonage Holdings Corp.*, 19 FCC Rcd 22404, ¶ 32 (rel. November 12, 2004) ("Accordingly, to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an



has continued to refuse to classify Interconnected VoIP as telecommunications service when it assessed USF contribution obligations on the service.<sup>11</sup> The Commission again pointed out the current non-classified status of Interconnected VoIP in finding that telecommunications carriers could interconnect with ILECs for the purpose of providing downstream interconnection to entities providing interconnected VoIP services to end-users.<sup>12</sup> The Commission repeated this observation again this past July in a ruling on a retention marketing dispute between cable Interconnected VoIP providers and Verizon, where it held that interconnected VoIP is still not classified as telecommunications service despite the fact that its providers may lawfully obtain numbering resources.<sup>13</sup> Even more recently, the FCC noted that Congress recognizes that VoIP is in a separate service category from telecommunications services, referring to VoIP as "IP-enabled voice services" in new legislation.<sup>14</sup>

Furthermore, as you may know the state of Georgia has preempted the regulation of VoIP as a telecommunications service. The Georgia law states that the Public Service Commission does not have "any jurisdiction, right, power, authority, or duty to impose any requirement or regulation relating to the setting of rates or terms and conditions for the offering of broadband service, VoIP, or wireless service." OCGA § 46-5-222(a). VoIP is defined as "voice over Internet protocol services offering real time multidirectional voice functionality utilizing any Internet protocol." *Id.* § 46-5-221(2). Although the statute distinguishes between "VoIP" and

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extent comparable to what we have done in this Order."), *aff'd*, *Minnesota Public Utilities Commission et al., v. FCC*, Case Nos. 05-1069 (8<sup>th</sup> Cir. 2007).

<sup>11</sup> *In the Matter of Universal Service Contribution Methodology*, Report and Order and NPRM, FCC 06-94, ¶ 56 (rel. June 27, 2006).

<sup>12</sup> *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, DA 07-709, ¶ 17 (rel. March 1, 2007) ("[T]he question concerning the proper statutory classification of VoIP remains pending in the *IP-Enabled Services* docket.").

<sup>13</sup> *Bright House Networks et al v. Verizon*, Memorandum Opinion and Order, FCC 08-159, fn. 91 (rel. June 23, 2008) ("...although the Commission has not determined whether interconnected VoIP service should be classified as a telecommunications service, and although only telecommunications carriers are entitled to obtain direct access to numbering resources, "[t]o the extent that an interconnected VoIP provider is licensed or certificated as a carrier, that carrier is eligible to obtain numbering resources directly from NANPA, subject to all relevant rules and procedures applicable to carriers") (internal citations omitted).

<sup>14</sup> *In the Matter of Implementation of the NET 911 Improvement Act of 2008*, Report and Order, FCC 08-249, fn 3 (rel. October 21, 2008) ("The NET 911 Act uses the term "IP-enabled voice service," which is given the same meaning as "interconnected VoIP service" as defined by section 9.3 of the Commission's rules. See NET 911 Act § 101(3); Wireless 911 Act § 7(8). For the purposes of this Order, the terms "IP-enabled voice services" and "interconnected VoIP" are used synonymously. An interconnected VoIP service is a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires IP-compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switched telephone network (PSTN) and to terminate calls to the PSTN. See 47 C.F.R. § 9.3.")


Joseph Lawhon  
December 12, 2008  
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"broadband services," *see* OCGA § 46-5-221 (defining broadband and VoIP services), both are effectively removed from the PSC's regulatory jurisdiction in the same manner. This provides further instruction to Georgia Power, if any were needed, that the law does not consider VoIP to be the same as telecommunications service or telephone service, even if they perform the same functions.

Thank you in advance for your assistance. We look forward to receiving your response.

Sincerely,

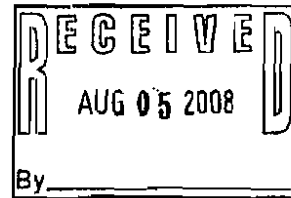


John D. Seiver  
Christopher A. Fedeli

cc: Stephen Loftin  
Robert P. Williams II

## Attachment III

BINGHAM



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Danielle Burt  
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Fax: 202.373.6001  
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danielle.burt@bingham.com

August 1, 2008

**Via Hand Delivery**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, S.W.  
Washington, DC 20554

Alexander P. Starr, Esq.  
Market Disputes Resolution Division  
Enforcement Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

**Re: EasyTEL Communications, Inc.; Request for Mediation of a Pole Attachment Dispute**

Dear Secretary Dortch and Mr. Starr:

EasyTEL Communications, Inc. ("EasyTEL") requests the Enforcement Bureau's assistance in mediating an ongoing pole attachment dispute between EasyTEL and the Public Service Company of Oklahoma ("PSO"). The dispute arises out of PSO's discriminatory application and incorrect computation of its pole attachment rate in Oklahoma. The Bureau's intervention is needed to compel PSO to comply with the Commission's rules regarding pole attachments.

**Parties and Jurisdiction of the Federal Communications Commission**

EasyTEL is an Oklahoma corporation whose principal place of business is 7335 S. Lewis Ave., Suite 100, Tulsa, Oklahoma 74136. EasyTEL offers video and telecommunications services in Oklahoma, including Tulsa, Jenks, and Broken Arrow.

PSO, a unit of American Electric Power, is located at 212 East 6th Street, Tulsa, Oklahoma 74119. PSO owns and maintains utility poles in Oklahoma. On information and belief, PSO is not a railroad, is not cooperatively organized and is not owned by the Federal Government or any State.

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Marlene H. Dortch, Secretary  
Alexander P. Starr, Esq.  
August 1, 2008  
Page 2

The State of Oklahoma has not certified that it regulates pole attachments, and therefore the Commission has jurisdiction in this matter.

#### **Background**

EasyTEL has a pole attachment agreement in effect with PSO, and pursuant to that agreement, has attached cabling to utility poles owned and controlled by PSO. PSO charges EasyTEL the maximum "telecommunications rate" permitted under FCC regulations, found at 47 C.F.R. § 1.1409(e)(2), because EasyTEL offers both telecommunications and video services.

In May 2008, EasyTEL received notice that its rate to attach to PSO's poles would increase to \$25.31 as of July 1, 2008. EasyTEL also discovered around May 2008 that PSO charges a lower "cable rate" to Cox Communications, Inc. ("Cox"), one of EasyTEL's competitors for both video and telecommunications customers. EasyTEL asked PSO to explain why a different rate was charged to Cox when both Cox and EasyTEL provide the same types of services. PSO replied that whereas EasyTEL admits providing both telecommunications and video services, Cox claims to provide only video and broadband Internet access services (including VoIP). EasyTEL has advised PSO that Cox provides both telecommunications and video services, as evidenced by the fact that affiliates of Cox have filed intrastate local exchange service tariffs with the Oklahoma Corporation Commission for service territories that include Tulsa. PSO failed to provide further explanation about the application of different rates. PSO has failed to reduce the rate charged to EasyTEL, and to the best of EasyTEL's knowledge has not increased the rate it charges Cox. Accordingly, PSO is maintaining a discriminatory pole attachment rate regime that benefits the larger, entrenched cable operator, Cox.

On June 6, 2008, EasyTEL requested PSO provide information on its calculation of rates for telecommunications attachments, to which PSO provided a response on June 20, 2008. Upon review of the computation, EasyTEL found the PSO uses the formula set forth in the Commission's rules at 47 C.F.R. § 1.1409(e)(2). However, PSO uses the formula with a factor of 3 for the average number of attaching entities. On July 9, 2008, EasyTEL asked PSO to explain whether the use of 3 attaching entities is derived from the FCC's rebuttable presumptive average as set forth in 47 C.F.R. § 1.1417(c) or whether PSO has established its own presumptive average. To date, PSO has not responded to that inquiry.

#### **PSO Fails to Apply its "Telecommunications Rate" on a Non-Discriminatory basis to Providers of Telecommunications and Cable**

Section 224 of the Communications Act of 1934, as amended, and the Commission's rules require a utility such as PSO to provide telecommunications carriers and cable system operators with non-discriminatory access to poles. EasyTEL and other providers of both telecommunications and cable services must be charged the same pole attachment rate. By charging EasyTEL the "telecommunications rate" and failing to charge the same

Marlene H. Dortch, Secretary  
Alexander P. Starr, Esq.  
August 1, 2008  
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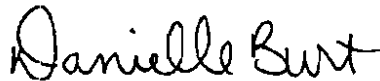
rate to similar providers, such as Cox, PSO violates the requirement to apply its rates on a non-discriminatory basis. If this violation is not addressed, EasyTEL's operations will be adversely harmed as it will be forced to absorb an additional cost not imposed on its competitor or its competitor's customers.

**PSO Fails to Use the Relevant Presumption for Number of Attachers**

When a utility elects to charge the maximum rate allowed for telecommunications carriers under the Commission's rules, it must use the formula set forth at 47 C.F.R. § 1.1409(e)(2), including the FCC's presumptive average of 5 attaching entities for an urban area such as Tulsa, unless it establishes its own presumptive average number. PSO has failed to demonstrate that it has established its own presumptive average number of attachers and wrongly uses a presumption of 3 attachers for an urban area. Therefore, PSO must recalculate the applicable telecommunications rate using a presumptive average of 5 attaching entities. In addition, PSO should only charge EasyTEL a rate calculated with the correct computation in future invoices and should credit EasyTEL's account to true-up overcharges incurred since July 1, 2008 when the current rate took effect.

EasyTEL has exchanged correspondence and has had one telephone conference with counsel for PSO since this matter came to its attention. We believe that further progress cannot be made without the Commission's assistance. On August 1, 2008, PSO's counsel was notified that this request for mediation would be filed, but EasyTEL has no knowledge of whether PSO will voluntarily agree to mediation. If PSO declines to participate in mediation, EasyTEL expects to proceed with a formal complaint.

Sincerely yours,



Charles A. Rohe  
Danielle Burt

Counsel for EasyTEL Communications, Inc.

cc: T. E. Kloehr, EasyTEL  
Thomas G. St. Pierre, Counsel for PSO